Anyum ak Sauk & Ors v Melur Gemilang Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO KCH 22–237/12 OF 2012
ALWI ABDUL WAHAB JC
22 APRIL 2016

Land Law — Customary land — Right to — First plaintiff claimed ownership of occupational ticket ('OT') which located within first defendant's land area — Whether first plaintiff's OT valid — Whether OT could be used to support claim of ownership — Whether locality of plaintiff's OT situated within defendant's land area, and if so, which title prevail — Native title — Land rights — Whether first plaintiff acquired native customary rights over area immediately to north of OT

The first defendant was issued with a provisional lease ('PL') for a land known as Lot 33, Block 2, Punda Sabal Land District by the fourth defendant which was later replaced by the lease of state land ('LSL') known as Lot 23, Block 2, Punda Sabal Land District ('Lot 23'). In the present action, the first plaintiff claimed that he was the rightful owner of the Occupational Ticket No 1095/27 ('OT') which was located within the boundary of the first defendant's oil palm mill built in the PL's area. The first plaintiff also alleged that he had acquired native customary rights ('NCR') over the said land. As such, the first plaintiff sought an order that the defendants were precluded from impairing, abridging or interfering with the plaintiff's said land. The defendants counterclaimed against the first plaintiff on the issue of fraud by the first plaintiff in relation to the said OT. The issues for determination ewere: (a) whether the first plaintiff's OT was valid and could be used to support the first plaintiff's claim of ownership of the said OT; (b) whether the locality of the first plaintiff's OT was situated within the oil palm mill of the defendants' PL and if so, which title shall prevail; and (c) whether the first plaintiff had acquired NCR over the area immediately to the north of the said OT.

Held, allowing the first plaintiff's claim and dismissing the defendants' counterclaim with costs of RM40,000:

(1) The court found that the first plaintiff's OT was valid. The said OT was originally issued to the plaintiff's late father and upon the death of his father the OT was transmitted and transferred to the first plaintiff as the registered proprietor. There was no evidence of any fraud whatsoever perpetuated by the first plaintiff or in collusion with others been adduced by the defendants. As the OT was valid, the first plaintiff was entitled to rely on the said OT for claim of ownership of the said land held under the said OT (see paras 16–17).

(2) The first plaintiff's claim that the locality of the first plaintiff's OT covers some parts of the defendants' oil palm mill on Lot 23 not only supported by the first plaintiff's witnesses but also backed up by the defendants' witnesses and the documentary evidence produced by the defendants. The PL or LSL should not have been issued to the first defendant in the first place as the validity of the first plaintiff's OT was still subsisting. The land affected by the issuance of the LSL was a land held under an OT which was a titled land and in terms of status to be given to it was very much higher than NCR which was untitled land (see paras 30, 36 & 38).

(3) The first plaintiff said that he went to Munggo Jitah three times in a month during the harvest season but in none of these occasions he ever gone back to the area outside the OT which was claimed to be his NCR land. There was also no evidence of land clearing for the purpose of cultivation whatsoever. Thus, the first plaintiff had failed to prove his claim that he had acquired NCR over the area immediately to the north of the said OT (see para 40).

[Bahasa Malaysia summary

Defendan pertama diberikan pajakan sementara ('PS') untuk tanah yang dikenali sebagai Lot 33, Blok 2, Daerah Punda Sabal oleh defendan keempat yang kemudiannya digantikan dengan pajakan tanah negeri ('PTN') yang dikenali sebagai Lot 23, Blok 2, Daerah Punda Sabal ('Lot 23'). Dalam tindakan ini, plaintif pertama mendakwa yang dia adalah pemilik sah Tiket Penghunian No 1095/27 ('TP') yang terletak dalam sempadan kilang kelapa sawit defendan pertama yang dibina di dalam kawasan PS. Plaintif pertama juga mendakwa bahawa dia telah mengambil alih hak-hak adat anak negeri ('HAAN') ke atas tanah tersebut. Dengan itu, plaintif pertama memohon perintah bahawa defendan-defendan dihalang daripada merosakkan, menyingkatkan atau campur tangan dengan tanah plaintif tersebut. Defendan-defendan menuntut balas terhadap plaintif pertama atas isu fraud oleh plaintif pertama berkaitan kepada TP tersebut. Isu-isu untuk penentuan adalah: (a) sama ada TP plaintif pertama adalah sah dan boleh digunakan untuk menyokong tuntutan plaintif pertama terhadap milikan TP tersebut; (b) sama ada kawasan TP plaintif pertama terletak dalam kilang kelapa sawit PS defendan-defendan dan jika ia, hakmilik yang mana akan menghalang; dan (c) sama ada plaintif pertama telah mengambil alih HAAN ke atas kawasan tersebut hampir kepada bahagian utara TP tersebut.

Diputuskan, membenarkan tuntutan plaintif pertama dan menolak tuntutan balas defendan-defendan dengan kos sebanyak RM40,000:

(1) Mahkamah mendapati bahawa TP plaintif pertama adalah sah. TP pada asalnya dikeluarkan kepada mendiang bapa plaintif dan atas kematian bapanya TP tersebut diturunkan dan dipindahkan kepada plaintif pertama sebagai pemilik berdaftar. Tidak terdapat langsung keterangan

mengenai apa-apa fraud dibuat oleh plaintif pertama atau dalam pakatan sulit dengan yang lain-lain telah dikemukakan oleh defendan-defendan. Memandangkan TP adalah sah, plaintif pertama berhak untuk bergantung ke atas TP bagi tuntutan pemilikan terhadap tanah tersebut yang dipegang di bawah TP tersebut (lihat perenggan 16–17).

(2) Tuntutan plaintif pertama bahawa kawasan plaintif pertama melitupi beberapa bahagian kilang kelapa sawit defendan-defendan atas Lot 23 bukan hanya disokong oleh saksi-saksi plaintif pertama tetapi juga disokong oleh saksi-saksi defendan-defendan dan keterangan dokumentar yang dikemukakan oleh defendan-defendan. PS atau PTN tidak patut dikeluarkan kepada defendan pertama pada mulanya kerana kesahan TP plaintif pertama masih wujud. Tanah yang terjejas oleh pengeluaran PTN tanah yang dipegang di bawah TP yang mana adalah tanah yang mempunyai hakmilik dan dari segi status diberikan kepadanya lebih tinggi daripada HAAN yang mana adalah tanah yang tidak mempunyai hakmilik (lihat perenggan 30, 36 & 38).

(3) Plaintif pertama menyatakan yang di pergi ke Munggo Jitah sebanyak tiga kali sebulan semasa musim penuaian tetapi tidak dalam masa ini dia pergi ke kawasan di luar TP yang didakwa sebagai tanah HAANnya. Juga tidak terdapat langsung keterangan mengenai pembersihan tanah bagi tujuan penanaman. Oleh itu, plaintif pertama telah gagal untuk membuktikan tuntutannya bahawa dia telah mengambil alih HAAN ke atas kawasan hampir kepada bahagian utara TP tersebut (lihat perenggan 40).]

Notes

For cases on right to customary land, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 3389–3395.

Cases referred to

Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 4 MLJ 204, HC (refd)

Nikodemus Anak Singgai & Ors v Sibu Slipway Sdn Bhd [2015] MLJU 646; [2016] CLJ 618, HC (folld)

TR Gayan ak Tabau & Ors v Vita Hill Sdn Bhd & Ors (Civil Suit No 21–4 of 2009) (unreported), HC (refd)

TR Sandah ak Tabau & Ors v Kanowit Timber Sdn Bhd & Ors (Civil Suit No 21–2 of 2009) (unreported), HC (refd)

Usang Ak Labit & 3 Ors v Rosebay Enterprise Sdn Bhd (Case No 21–1 of 2010) (unreported), HC (refd)

Legislation referred to

Land Code (Cap 81)
Land Surveyors Ordinance 2001 (Cap 40)

Dominique Ng (Dominique Ng & Assoc) for the first plaintiff.
Arthur Lee (Parameswary with him) (Arthur Lee, Lin & Co Advocates) for the first and second defendants.
Dayang Farzilla bt Awang Sabu (Evy Liana bt Atang with her) (State Attorney General's Chamber) for the third and fourth defendants.

Alwi Abdul Wahab JC:

INTRODUCTION

[1] This is a claim by the first plaintiff (Anyum ak Sauk) for various declaratory reliefs and orders among others, that he is the rightful owner and beneficiary of the Occupational Ticket No 1095/27 or otherwise known as Sadong Occupational Ticket No 1095 ('the said OT') located at 'Munggu Jitah'; that he had acquired native customary rights ('NCR') over the plaintiff's said land; and that the first, second, third and fourth defendants, whether by themselves or their own employees, servants or agents or assigns and/or contractors, are precluded from impairing, abridging or interfering with the plaintiff's said land.

[2] The said OT comprising of three acres of land was originally issued to Anyum's late father ie Sauk Apai Dayang on 28 October 1927 for the purpose of planting rubber trees and for a period of 20 years, renewable at the occupant's option, for such terms and at such rent as the government may determine at the expiration of such term.

[3] The second plaintiff ie Stanley Oscar Bryan was struck out as the second plaintiff in the present case due to his status as undischarged bankrupt but called as PW3. The third plaintiff ie Zolhaidah bt Suboh was also struck out as the third plaintiff by the court on the request made by Mr Dominique, counsel for the first plaintiff during the trial of this case.

[4] In 2002, the first defendant was issued with a Provisional Lease ('PL') for Lot 33, Block 2, Punda Sabal Land District (exh CB(C) pp 18–20) by the fourth defendant through the third defendant which was later replaced by the Lease of State Land ('LSL') known as Lot 23, Block 2, Punda Sabal Land District (exh CB(C) pp 15–17). The first defendant is the wholly owned subsidiary of the second defendant.

THE ISSUES FOR THE COURT'S CONSIDERATION

[5] Whilst it was the case for the first plaintiff that he was the rightful owner of the said OT which was located within the boundary of the first defendant's oil palm mill built in the PL's area, the first and second defendant's ('the defendants') case was that by virtue of the PL legally issued which was later replaced by LSL to the first defendant by the fourth defendant through the third defendant, their titled land is indefeasible. It is the defendants' contention that the first plaintiff cannot claim for any rights over the said land occupied by the first defendant as it lies on the land alienated to the first defendant. The alienation of the land under the PL by the state authority to the first defendant would have extinguished the native customary rights ('NCR') claim by the first plaintiff. Quite similar to the defendants' defence, the third and fourth defendants' case was that the said OT has expired without being renewed and should therefore revert back to the fourth defendant. It was also the third and fourth defendants' case that the issuance of the PL to the first and second defendants was made in accordance with the provision of law.

[6] From my reading through the submissions of the parties, there are three pertinent issues identified for my consideration and they are as follows:

(a) whether the first plaintiff's OT is valid and if so valid whether it could be used to support the first plaintiff's claim of ownership of the said OT;

(b) whether the locality of the first plaintiff's OT is situated within the oil palm mill of the defendants' PL and if it is so which titles: the first plaintiff's OT or the defendants' PL takes precedence; and

(c) whether the first plaintiff had acquired NCR over the subject land claimed by him as shown in exh P1.

Whether the first plaintiff's OT is valid and if so valid whether it could be used to support the first plaintiff's claim of ownership of the said OT

[7] To prove ownership of the said OT, the first plaintiff had produced to the court the original copy of the said OT marked as exh CB(B) pp 1–4 and a similar copy was exhibited by the third and fourth defendants marked as CB(A) p 11. The original copy of the said OT ie exh CB(B) pp 1–4 bears the name of 'Sauk Apai Dayang', who is the first plaintiff's late father. Exhibit CB(B) pp 15–16, is the official extract of title dated 1 December 2011 for Sadong Occupation Ticket 1095 which bears the name of 'Anyum Anak Sauk' as the registered proprietor. The printout title ie exh CB(B) pp 25–26 extracted on 14 August 2012 was also registered under the name of 'Anyum Anak Sauk'.

[8] The defendants raised a few issues to discredit the first plaintiff's entitlement of the said OT. First, the defendants took issue on the

non-production of the first plaintiff's birth certificate. Without the first plaintiff's birth certificate, he cannot prove that he is an Iban and a native to entitle his claim of ownership of the OT and the NCR over the subject land. The second issue is on the different names appeared in the first plaintiff's letter of administration ie exh CB(B) p 6 in which the name of the first plaintiff's father is stated as 'Sawak Anak Usek' whereas in exh CB(B) pp 1–4, it is stated as 'Sauk Apai Dayang'. It was also the defendants' contention that the first plaintiff had abandoned Munggo Jitah to Kampung Batu Kepit, Simunjan and under the adat Iban, he had relinquished his rights over the NCR land. Further, the defendants submit that the first plaintiff had failed to adduce aerial photographs to show the cultivation and/or occupation by his late father. It was also the defendants' submission that all the other witnesses namely Tuai Rumah Nelson ak Amba ('PW2'), Stanley Oscar ('PW3') and Rapelson Richard Hamit ('PW4') did not corroborate the first plaintiff's evidence as they had no personal knowledge over the subject land.

[9] It is an undisputable fact that the OT was supposed to be valid for 20 years and should be expired in 1947 but there was no record to show that it was ever renewed or extended by anyone. It is also undisputable, based on the documentary evidence exh CB(B) p 6, the first plaintiff was granted a letter of administration to administer the estate of his late father. The first plaintiff's application for the transmission of the said OT from his late father to his name was approved by the third defendant as shown in the official extract title issued by the Land and Survey Department, Samarahan, exh CB(B) pp 15–16.

[10] In my view, although the said OT was not renewed officially by the first plaintiff but what really matters is that the new OT in respect of the same parcel of land at Munggo Jitah under the name of the first plaintiff was reissued which is on perpetuity basis (exh CB(B) pp 15–16 and exh CB(B) pp 25–26). Such title would not have been issued by the third defendant if there is no merits to the first plaintiff's claim on the basis of proper documentation as per the requirement set out by the Sarawak Land Code under the care of the Assistant Registrar of the Lands and Surveys, Samarahan ie Liu Tow Kee ('3DW2'). The process of transfer of name and the registration were done transparently so there cannot be any question of impropriety or illegality as what the defendants was trying to make this court to believe.

Knowledge of the first plaintiff's claim by the defendants

[11] The third and fourth defendants claimed no knowledge about the existence and the location of the first plaintiff's OT as there was no record in their cadastral system. In their submission, the third and fourth defendants stated that they only came to know about the first plaintiff's OT when they received a complaint letter from the first plaintiff's advocate ie Messrs Terang,

Manjit, Azmi & Hardip Singh dated 14 October 2009 (exh CB(B) pp 55–56). I find that this is not a correct statement of facts because this is not the first plaintiff's advocate's letter but the letter from the second defendant informing Messrs Terang, Manjit, Azmi & Hardip Singh that the matter concerning the first plaintiff's OT was highlighted to the second defendant by the third defendant in February 2009. In the said letter by the second defendant, it was mentioned that there was a suggestion by the third defendant's officer named En Ramli for the first plaintiff to identify and confirm the position of the land and the survey to be conducted by the Lands and Surveys Department, Samarahan.

[12] In that letter exh CB(B) pp 55–56, the second defendant also informed Messrs Terang, Manjit, Azmi & Hardip Singh that Tuai Rumah Nelson ak Amba ('PW2') had written a letter dated 30 August 2004 (exh CB(B) p 61) addressed to the Superintendent of the Lands and Surveys, Samarahan regarding the first plaintiff's OT. It was further mentioned in that letter exh CB(B) pp 55–56, that the Lands and Surveys Department, Samarahan had not done any follow-up despite receiving exh CB(B) p 61 in 2004. It is a fact that the joint survey between the Lands and Surveys Kota Samarahan and the first plaintiff was only conducted sometime end of 2009.

[13] Although both the witnesses from the Lands and Surveys, Samarahan, 3DW2 and 3DW4 claimed to have no knowledge of the letter dated 30 August 2004 (exh CB(B) p 61), I am of the view the letter was received by their superior officer ie the Superintendent of the Lands and Surveys, Samarahan based on the second defendant's letter, exh CB(B) pp 55–56. I share the sentiment expressed by the first plaintiff's counsel that if the third and fourth defendants have been sufficiently diligent and took immediate action to carry out the survey upon receipt of Tuai Rumah Nelson's letter dated 30 August 2004, they would have been in time to stop or prevent the conversion of the defendants' PL to a LSL in 2006 based on exh CB(C) pp 15–17.

[14] The defendants' witness, Awang Halmi bin Awang Daud ('1DW2'), the contractor from Newgain Enterprise Sdn Bhd who was engaged by the defendants to do the clearing work on the defendants' PL admitted that there was correspondence between Tuai Rumah Nelson and his villagers with his company in respect to the area claimed by the first plaintiff as far back in 2001 (p 265 lines 1–4 of the notes of proceedings) when he was referred to the letter dated 30 August 2004 by Tuai Rumah Nelson's (exh CB(B) p 61). This means that the defendants have prior knowledge of the first plaintiff's claim of the disputed area even before Tuai Rumah Nelson's letter to the Superintendent of the Lands and Surveys, Samarahan dated 30 August 2004.

[15] The first plaintiff by his statutory declaration exh CB(B) p 5 had

affirmed that 'Sawak' (as in his father's identity card exh CB(A) p 1) and 'Sauk' (as in the first plaintiff's identity card exh CB(C) p 8) is the same person who is his late father. In both his late father's identity card exh CB(A) p 1 and death certificate exh CB(A) p 2, his late father's race is stated as Iban or Sea Dayak. He testified that his mother is also an Iban. It is beyond dispute that the first plaintiff ought to be an Iban by race following the race of his late parents although the first plaintiff's birth certificate is not produced in court. As to the name of 'Sauk Apai Dayang' stated in the first plaintiff's OT (exh CB(B) pp 1–4), the first plaintiff had explained in his evidence that this is the traditional way of how the Iban calling one's father in those days where the word 'apai' means 'father' in Iban. The word 'Dayang' is the name of the first plaintiff's elder sister and the eldest in the family. So the words 'Sauk apai Dayang' is translated in full to mean 'Sauk the father of Dayang'. Thus based on the documentary evidence, I cannot deny that 'Sauk ak Usek' and 'Sawak ak Usek' is referring to one and the same person.

[16] It is my findings of fact that the first plaintiff's OT is valid. The said OT was originally issued to Sauk Apai Dayang, the first plaintiff's late father in 1927 and upon the death of his father the OT was transmitted and transferred to the first plaintiff as the registered proprietor. The defendants put up the defence that the first plaintiff had committed fraud on the third defendant to obtain an alleged survey and a subsequent transmission and beneficiary transfer of the said OT to the first plaintiff's title. I find however there is no evidence of any fraud whatsoever perpetuated by the first plaintiff or in collusion with others been adduced by the defendants.

[17] Based on the above findings, it is my view that the validity of the first plaintiff's OT is beyond question. Hence, the first plaintiff is entitled to rely on the OT to seek for a remedy to claim for an ownership of the said areas of land held under the said OT.

Whether the locality of the first plaintiff's OT is situated within the oil palm mill of the defendants' PL and if it is so which titles: the first plaintiff's OT or the defendants' PL takes precedence

[18] It was the first plaintiff's contention that the first plaintiff's OT covers some parts of the defendants' oil palm mill on Lot 23, Block 2, Punda Sabal Land District. The first plaintiff produced exh P1, a map prepared by PW4 who is a community mapper from Sadia (Sarawak Dayak Iban Association) showing the location of the first plaintiff's OT and the adjacent areas which the first plaintiff's claim as his NCR. The defendants contended that exh P1 is not valid and therefore should not be accepted by the court for reasons that PW4 is not a qualified and licensed surveyor within the meaning and purview of the

Land Surveyors Ordinance 2001 (Sarawak) (Cap 40). I will deal with this issue in the latter part of this judgment.

[19] The defendants, however, submitted that the first plaintiff could not prove the exact location of the first plaintiff's OT. The evidence adduced by the first plaintiff as to the identity and locality of the said OT is subject to question. Tuai Rumah Nelson's ('PW2') evidence that there were more or less seven hills or 'munggus' at Munggo Jitah, the location where the first plaintiff's claim to be the area of his OT cannot be identified by Rapelson Richard Hamit ('PW4'), in exh P4 (Balai Riggin Map).

[20] 1DW2 also testified that there were no hills within the defendants' oil palm mill area. There was also no sign of cultivation. In his witness statement WS-1DW2, Q & A6, he stated that during the clearing work no one came forward to demand for compensation so there was no question whether there was any compensation paid to anyone including the first plaintiff. However, I find that 1DW2's witness statement contradicts his oral evidence at p 265 lines 1–4 of the notes of proceedings where he testified that there were correspondences between Tuai Rumah Nelson with his company Newgain far back in 2001 which means that the first plaintiff's claim was already known then.

[21] Anthony Rentap Enchana ('1DW3') from Chemsain Konsultant Sdn Bhd who carried out the environmental impact assessment study (exh SBOD (1D & 2D) pp 2–213) on the oil palm mill project informed the court that there were no settlements within the said project boundary and also testified that the said project was situated on an existing forest reserve area.

[22] The first plaintiff submitted that it is incredulous for the defendants to pick up on Rapelson's evidence for not identifying the hills in exh P4 because it is obvious that when he entered the area on 5 May 2015, the oil palm mill was readily existed and the building built on the oil palm mill would have flattened or demolished the hills in the immediate vicinity. The first plaintiff further submitted that through the defendants' own evidence, they had actually confirmed the existence of the seven hills or 'munggus' which they referred to as quarry reserves.

[23] By the defendants' own witness namely Azam Razali bin Atan ('1DW4') who testified that the shaded areas in red stripes at the bottom right corner of the enlarged Map 269 or exh 1D2 (exh SBOD (1D & 2D) p 269) show the quarry sites and hills of the subject area. According to 1DW4 these quarry sites or reserves are themselves 'bukit-bukit' of ten feet plus in height or higher (p 374 lines 16–26 of the notes of proceeding) which evidence is consistent with Tuai Rumah Nelson's estimation that the hills or the 'munggus'

to be as high as the top of the tree (p 87 lines 12 and 16 of the notes of proceeding). The reference to these six or seven'munggus' according to Tuai Rumah Nelson in the area called Munggo Jitah (the six or seven hills or quarry sites or reserves as referred to by the defendants) in my view, is not by way of coincidence but it goes to support the first plaintiff's contention that the existence and locality of the first plaintiff's OT overlaps with the defendants' oil palm mill.

[24] 1DW2 had positively identified these six or seven quarry reserves on the enlarged Map 269 (exh 1D2 and exh SBOD (1D & 2D) p 269) in the vicinity of the defendants' oil palm mill. Specifically, he pointed at the upper part of Block 7C of the enlarged Map 269 as the location of the defendants' oil palm mill (p 257 lines 4–8 of the notes of proceeding). 1DW2's evidence on the locality of the oil palm mill was confirmed by 1DW4 (p 372 lines 1–4 of the notes of proceeding).

[25] Tuai Rumah Nelson's evidence that there were six or seven hills or 'munggus' in the said OT's area, 1DW4's evidence that the quarry sites or reserves shown in the enlarged version of Map 269 were comprised of hills or 'bukit-bukit' and 1DW2's confirmation of these quarry sites and reserves in the vicinity of the defendants' oil palm mill area, overwhelmingly show that the defendants' oil palm mill is actually sited on top of one or two of such quarry reserves (shaded in red stripe in Map 269) or otherwise known as 'munggu' of the said OT of the first plaintiff.

[26] In this respect, the evidence of the estate manager of the second defendant ie Wan Mohd Nisal bin Wan Sembok ('1DW1') is most instructive in support of the first plaintiff's case. When the map exh CB(B) p 65 (a similar copy in CB(C) p 1), was referred to 1DW1, he told the court that he was very familiar with this map. He then indicated the location of the defendants' oil palm mill at the place marked 'see insert' in the map (p 240 lines 8–11 of the note of proceedings). If one looks at the 'inset' itself at the bottom left corner in the map exh CB(B) p 65, it actually refers to Sadong Occupational Ticket No 1095 as indicated by the 'Legend' (in the yellow box) at the far bottom left of the map. This is the very place where 1DW1 identified in the 'see inset' as their oil palm mill.

Exhibit CB(B) p 66

[27] Exhibit CB(B) p 66 clearly shows the areas of the first plaintiff's said OT, which is labelled as 'F/L1, OT 1095' in the 'Inset'.

[28] It is also clearly shown in exh CB(B) p 66 that the plaintiff's OT is represented by some six to seven areas in yellow colour with a cleared areas of

approximately 16.99 ha as indicated by the 'Legend'. If we accept the claim by 1DW2 as true that there was no cultivation during the clearing work then, there would have been no signs of such clearing in the areas where the defendants' oil palm mill and the first plaintiff's OT are located in exh CB(B) p 66.

[29] This documentary evidence ie exh CB(B) p 66 which is the third defendant's document showing the existence of some six to seven cleared areas more or less correspond with the six to seven quarry reserves of the defendants' oil palm mill areas shown in Map 269 (exh 1D2 and exh SBOD (1D & 2D) p 269). These two maps produced by the defendants ie exh CB(B) p 66 and map 269 in turn also correspond with the evidence of Tuai Rumah Nelson, that there are six to seven 'munggus' in the vicinity of the first plaintiff's OT, called or known as 'Munggo Jitah'.

[30] Based on the above considerations, I find that the first plaintiff's claim that the locality of the first plaintiff's OT covers some parts of the defendants' oil palm mill on Lot 23, Block 2, Punda Sabal Land District, not only supported by the first plaintiff's witnesses but also backed up by the defendants' witnesses namely 1DW1, 1DW2 and 1DW4 and the documentary evidence produced by the defendants.

Exhibit P1, the map produced by PW4, a community mapper

[31] Despite the objection taken up the defendants that exh P1 should not be accepted by the court, I find that PW4 is a competent witness who had attended some trainings and courses on the subject of Geographic Information System ('GIS') and related computer programs for GIS to be able to produce the map exh P1. By way of experience, PW4 had produced more than 50 community and individual maps using GIS for the period of seven years.

[32] In accepting exh P1, I relied on the recent case decided by Lee Heng Cheong J in *Nikodemus Anak Singgai & Ors v Sibu Slipway Sdn Bhd* [2015] MLJU 646; [2016] CLJ 618 following the case of *Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 4 MLJ 204 on the same issue that community mapping could be accepted as evidence regardless of the status of the surveyor. In the earlier case of *TR Gayan ak Tabau & Ors v Vita Hill Sdn Bhd & Ors* Civil Suit No 21–4 of 2009 (Sibu High Court) and *TR Sandah ak Tabau & Ors v Kanowit Timber Sdn Bhd & Ors* (Civil Suit No 21–2 of 2009), Yew Jen Kie J in admitting the map prepared by PW2 who is not a land surveyor within the meaning of the ordinance, said as follows:

> The map was not produced for submission to the government authorities under the Land Code or any written law. It did not include a title survey, it was therefore not to use in connection with the issuance or registration of land title. The map was

produced solely to be used as evidence in court proceedings for the plaintiff. A

[33] Similarly, in the present case, the sole purpose of exh P1 produced by PW4 is to identify the locality of the first plaintiff's OT and NCR claimed by the first plaintiff to be situated at the same place as the defendants' oil palm mill. PW4 described in fine detail how he took the GPS points on the ground and recorded the area claimed by the first plaintiff in the presence of the first plaintiff, stored the field data into the computer, compiled its attributes before displaying and plotting them into exh P1. All these are reflected in PW4's witness statement. I find that PW4's evidence to be credible and weight ought to be given to the contents of exh P1. B C

[34] I also find exh P1 resembles the map exh CB(B) pp 65–66 produced by the third defendant. It is evidently clear that there are some similarities between all the three maps in terms of the locality of the subject land claimed by the first plaintiff and the defendants' oil palm mill. D

[35] The survey of the subject land was conducted by a surveyor from the third defendant ie Ismail bin Fadli ('3DW3') who planted the pegs according to the information obtained from the first plaintiff. There was a suggestion that the first plaintiff had shown and instructed 3DW3 to plant the pegs at the place as he wishes but the defendants had not shown any evidence to prove that the first plaintiff had conducted himself in such manner. In my view, by suggesting for a joint survey to identify and confirm the locality of the first plaintiff's OT, the defendants must have appreciated and recognised the basis of the first plaintiff's claim. E F

Which title: The first plaintiff's OT or the defendant's PL/LSL shall prevail?

[36] As a result of my above findings, it is imperative to determine which of these two titles prevails in view that both of these titles were valid. There is no dispute that the OT was the first title issued over many years respecting the subject land before it was registered and transferred to the first plaintiff's name in 2009. It is also undisputed that PL was issued to the first defendant and replaced with the LSL in 2006. In my view, the PL or LSL should not have been issued to the first defendant in the first place as the validity of the first plaintiff's OT is still subsisting. The claim over the subject land was made clear to the defendants since 2001 through correspondence between Tuai Rumah Nelson and his villagers with Newgain, a contractor appointed by the defendants to do the clearing work. The Superintendent of the Lands and Surveys Department, Samarahan was also informed about the claim on the subject land through the letter dated 30 August 2004 by Tuai Rumah Nelson as proven by exh CB(B) pp 55–56. Had there been a proper attention and action given to the claim over G H I

the subject land by the defendants named therein, the PL or LSL would not have been issued at all.

[37] In *Usang Ak Labit & 3 Ors v Rosebay Enterprise Sdn Bhd* (Case No 21–1 of 2010), when facing with similar situation where the lease of state land was issued without consulting the owner of the subject land, Yew Jen Kie J had said:

> ... the status of the native customary land claimed by the fourth plaintiff has been compromised by the issue of the Lease of State Land Lot 13, thereby leaving the plaintiffs with no choice but to come to court for declaratory order.

[38] In the present case, the land affected by the issuance of the LSL is a land held under an OT which is a titled land and in terms of status to be given to it is very much higher than NCR which is untitled land but even in NCR case too as in *Usang Ak Labit*, the court had ruled that the action of the land authorities in issuing the LSL had compromised the status of the NCR land claimed by the plaintiff therein.

Whether the first plaintiff had acquired NCR of the subject land claimed by him as shown in exh P1

[39] The total areas of land claimed by the first plaintiff is 4.35 acres including 1.35 acres of his NCR land over the area immediately to the north of the said OT shown in exh P1. PW4's evidence at para 17 of his witness statement (WS-PW4) stated that Point 016 is the extended area of the first plaintiff NCR land repositioned from Point 032 which is the border of the first plaintiff OT's area (see exh CB (B) p 65).

[40] In his evidence, PW1 (the first plaintiff) said his late father planted rubber trees and fruit trees within the said areas held under the OT. He further testified that there are rubber trees also planted outside the OT's area which he claimed to be his NCR land. Although the first plaintiffs evidence was supported by the map exh P1 which shows there are rubber trees planted outside the OT's area at point 031 and referred as 'kawasan Kebun Getah Anyum Ak Sauk', regret to say that such evidence is insufficient to prove that he had acquired NCR over the subject land. What we have in evidence were that his late father had planted rubber trees and fruit trees after been issued with the OT in 1927. They had their tembawai called 'Tembawai Sauk' at Bukit Gita or better known as 'Munggo Jitah' before moving to Kampung Batu Kepit at which place where his father passed away. He said in court that he always returned to Bukit Gita to do the land clearing and repairing work to his tembawai, and the last visit was in 2005. When asked how often he went back to Munggo Jitah in cross-examination, he said he went there three times in a month during the harvest season. In none of these occasions he ever gone back to the area outside the OT which is claimed to be his NCR land. There is also

no evidence of land clearing for the purpose of cultivation whatsoever. I therefore find that the first plaintiff had failed to prove his claim that he had acquired NCR over the area immediately to the north of the said OT shown in exh P1.

CONCLUSION

[41] The first plaintiff has succeeded in discharging the onus that the land known as Lot 23 is the same piece of land which was held under Occupation Ticket 1095/27 on the balance of probabilities. I enter judgment as per the prayers sought for by the first plaintiff. I also dismiss the defendants' counter claim as I find that their claims based on fraud had no basis and it contains lack of material particulars.

[42] In the result, I make the following orders against the first, second, third and fourth defendants:

(a)(i) a declaration that the first plaintiff is the rightful owner of the Occupational Ticket No 1095/27, or otherwise known as Sadong Occupational Ticket No 1095;

(ii) a declaration that the first, second, third and fourth defendants, whether by themselves or their own employees, servants or agents or assigns and/or contractors, are precluded from impairing, abridging or interfering with the first plaintiff's said land held under the OT;

(iii) a declaration that the actions or activities of the first and second defendants, whether by themselves or their own employees, servants or agents or assigns and/or contractors, either individually or collectively, in clearing, destroying of properties on the plaintiff's said land held under the OT are void and/or wrongful;

(iv) a declaration that the act of the third defendant and/or the fourth defendant in issuing the said provisional leases to the first and second defendants are void and/or wrongful;

(v) an order directing that the first and second defendants, and/or their own employees, servants or agents or assigns and/or contractors deliver vacant possession of the plaintiff's said land held under the OT to the first plaintiff forthwith; and

(vi) an order directing the third defendant to give effect to the aforesaid

declarations and to rectify the land register to exclude or excise the area of the first plaintiff's OT from Lots 23 or 33 of the first and second defendants;

(b) general damages to be assessed by the senior assistant registrar for the loss of the first plaintiff's OT over the subject land which had been alienated to the first and second defendants by the fourth defendant through the third defendant; and

(c) costs of RM40,000 to be awarded to the first plaintiff.

First plaintiff's claim allowed and defendants' counterclaim dismissed with costs of RM40,000.

Reported by Dzulqarnain Ab Fatar